TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 614.

CHARLES L. BAENDER, APPELLANT,

vs.

FRANK BARNETT, AS SHERIFF OF ALAMEDA COUNTY, CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED NOVEMBER 13, 1900.

(27,971)

(27,971)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 15, 1920.

a In the Southern Division of the District Court of the United States for the Northern District of California, First Division.

No. 16951.

In the Matter of CHARLES L. BAENDER. On Habeas Corpus.

1 In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. (16951).

CHARLES L. BAENDER, Plaintiff & Petitioner,

vs.

FRANK BARNET, as Sheriff of Alameda County, California, Defendant.

Præcipe Designating Parts of Record to be Included in Transcript of Appeal to the Supreme Court of the United States.

To the Clerk of the above-entitled court:

You are requested to take a transcript of record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause and to include in such transcript or record the following and no other papers or exhibits, to wit: Complaint, demurrer, order sustaining demurrer and denying the petition of plaintiff for a writ of habeas corpus, opinion of Court, notice and petition for appeal to the Supreme Court of the United States, and order allowing the claim of appeal, assignment of errors.

Respectfully.

ALBERT E. CARTER,
FRED C. PETERSON,
Attorney- for Plaintiff.

(Endorsed:) Filed Oct. 21, 1920. W. B. Maling, clerk, by C. W. Calbreath, deputy clerk.

2 In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. (16951).

CHARLES L. BAENDER, Plaintiff and Petitioner,

vs.

FRANK BARNET, as Sheriff of Alameda County, California, Defendant.

Complaint and Petition of Plaintiff for a Writ of Habeas Corpus.

Now comes the above named plaintiff and petitioner into this Honorable Court, and for cause of action alleges:

I.

That he is a citizen of the United States of America, residing in the City of Oakland, County of Alameda, State of California;

II.

That on January 29, 1918, there was filed in the above entitled Court an indictment against him in two counts; that on November 18, 1918, the first of said counts was dismissed by said Court, and he plead "guilty" to the second count which charged, in substance, that plaintiff did, at a time and place mentioned, without lawful authority, have in his possession certain dies, described therein, in violation of section 169 C. C. U. S.; that plaintiff explained, in open court, that the dies were contained in some junk which he had purchased for use in his factory, and that he did not know at that time that said dies were in said junk; nor that the dies came into his possession; no evidence was presented to show the contrary, or to show any evil intent of plaintiff.

III.

That on November 27, 1918, the above Court made and entered a purported order and judgment on plaintiff's plea aforesaid, that plaintiff be imprisoned for the period of one year in the
3 County Jail, County of Alameda, State of California, and that he pay a fine in the sum of Ten Dollars;

IV.

That Frank Barnet, defendant, is the elected, qualified and acting Sheriff of said County of Alameda, State of California, and is in immediate charge and control of said County Jail, and has the custody of all of the persons confined therein;

V.

That on May 10, 1920, plaintiff was delivered to said Frank Barnet, and confined by him, the said Barnet, in said County Jail in execution of said purported judgment of imprisonment;

VI.

That plaintiff has been ever since said 10th day of May, 1920, and now is being confined and restrained of his liberty in said County Jail by said Barnet in execution of said purported judgment of imprisonment; and that said County Jail is in and within the territorial jurisdiction of the above entitled Court;

VII.

That the clause of section 169 C. C. U. S., upon which the said second count was predicated, is the following: "whoever, without lawful authority, shall have in his possession any such die, shall be fined not more than five thousand dollars and imprisoned not more than ten years";

VIII.

That the Congress enacted this legislation without lawful authority; that it is contrary to the Constitution of the United States and the laws enacted thereunder; that the above entitled Court had no jurisdiction to make and enter the aforesaid purported order and judgment and that said purported order and judgment by which plaintiff is now being restrained of his liberty was made and entered by the above entitled Court without lawful authority; and without due process of law; and that said judgment is contrary to
4 the Constitution and has no law or statute to support it;

IX.

That plaintiff is now being restrained of his liberty contrary to the Constitution of the United States and laws enacted thereunder, and without the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States;

X.

That the matters complained of herein by plaintiff have not been adjudicated by any court of the United States, and that plaintiff has no other complaint pending in any court in the United States in which the matters set forth in the foregoing complaint, or any part thereof, are included.

Wherefore plaintiff prays this Honorable Court to issue a writ of Habeas Corpus directed to said Frank Barnet, Sheriff of said County of Alameda, State of California, commanding him to produce the body of petitioner at a certain time and place to be by this Honorable Court appointed, with the day and cause of his detention, to do, submit to and receive whatsoever this Honorable Court shall consider in that behalf.

Signed at Oakland, County of Alameda, State of California, this 20th day of September, 1920.

CHARLES L. BAENDER,
Plaintiff and Petitioner.

5 STATE OF CALIFORNIA,
County of Alameda, ss:

Charles L. Baender, being first duly sworn, deposes and says: That he is the Plaintiff and Petitioner named in the foregoing instrument;

that he has read and knows the contents thereof; that the same is true of his own knowledge except those matters stated upon information and belief, and as — those matters he believes them to be true.

CHARLES L. BAENDER,
Plaintiff and Petitioner.

Subscribed and sworn to before me this 20th of September, 1920.

LOVETT K. FRASER, [SEAL.]
Notary Public in and for the County of Alameda, State of California.

(Endorsed:) Filed Sep. 21, 1920. W. B. Maling, clerk by T. I. Baldwin, deputy clerk.

6 In the Southern Division of the United States District Court for the Northern District of California. First Division.

CHARLES L. BAENDER, Plaintiff and Petitioner.

vs.

FRANK BARNET, as Sheriff of Alameda County, California, Defendant.

Demurrer to Complaint and Petition of Plaintiff for a Writ of Habeas Corpus.

Comes now defendant above named, by and through the United States Attorney for the Northern District of California, and demurs to the complaint and petition of plaintiff for a writ of habeas corpus on file herein, and for grounds of demurrer alleges:

I.

That the facts therein stated are insufficient to constitute a cause of action against defendant above named.

II.

That this Court has no jurisdiction over the matters therein set out.

III.

That said complaint and petition for writ of habeas corpus is uncertain in that it cannot be ascertained therefrom whether petitioner is being detained under and by virtue of a Federal warrant or judgment.

7 Wherefore, defendant prays that he be hence dismissed with his costs.

FRANK M. SILVA,
United States Attorney.
Attorney for Defendant.

(Endorsed:) Filed Oct. 2, 1920. W. B. Maling, clerk, by Lyle S. Morris, deputy clerk.

8 In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16051.

In the Matter of C. L. BAENDER. On Habeas Corpus.

L. K. Fraser, Esq., and A. E. Carter, Esq., Attorneys for Petitioner.
Frank M. Silva, Esq., United States Attorney and W. H. Tully, Esq., Assistant United States Attorney, Attorneys for Respondent.

(Opinion and Order.)

On Demurrer to Petition for a Writ of Habeas Corpus.

The petitioner having pleaded guilty to an indictment charging him with a violation of Section 169 of the Criminal Code was sentenced to serve one year in the Alameda County Jail. He now seeks discharge from such imprisonment on the ground that the portion of said Section under which he was sentenced is unconstitutional. The portion at which this attack is directed is as follows:

"Whoever, without lawful authority, shall have in his possession "any such die, hub, or mold, or any part thereof," shall be punished as provided.

The hub, die or mold referred to is described in the section as a die, hub or mold in the likeness or similitude * * * of any die, hub, or mold designated for coining or making certain coins of the United States. The whole section is directed against counterfeiting. Petitioner urges that Congress has no power to make the mere possession of dies, without lawful authority, a criminal offense. That such possession may be innocent, may be unwitting, and that the section does not give one charged therewith any opportunity to show that such possession was innocent, or even without his knowledge.

9

But where mere possession of anything is made an offense the law always intends, and has always been construed to intend a willing and conscious possession. Such is the possession denounced in the statute under consideration, such is the possession intended by the indictment, and such is the possession, the petitioner having pleaded guilty to the indictment, that he must be held to have had. Otherwise he was not guilty. He might have pleaded not guilty, and upon trial shown that he did not know the dies were in his possession. But upon a plea of guilty no such explanation was admissible. As said by the Circuit Court of Appeals in passing upon this very indictment, "Congress evidently intended that the unlawful possession "of such dies should be sufficient evidence to warrant a conviction, "unless the accused could explain the possession to the satisfaction of

"the jury." Baender vs. U. S., 260 Fed. 832. In the case of United States vs. Arjona, 120 U. S. 479, a similar provision was held constitutional, although not considered by the Court from the angle here presented. It is significant, however, that its general constitutionality was not questioned by the Supreme Court, or by the Court below which certified the questions upon which their opinions were opposed, but only its constitutionality as applied to "Foreign banks "and corporations."

10 I believe the provision in question to be constitutional, and the demurrer to the petition is therefore sustained, and the petition itself denied.

October 7th, 1920.

M. T. DOOLING,
Judge.

(Endorsed:) Filed Oct. 7, 1920. W. S. Maling, clerk, by C. M. Taylor, deputy clerk.

11 In the Southern Division of the United States District Court for the Northern District of California, First Division.

CHARLES L. BAENDER, Plaintiff and Petitioner,

vs.

FRANK BARNET, as Sheriff of Alameda County, California, Defendant.

Notice of Appeal and Petition for Appeal to the Supreme Court of the United States and Order Allowing Claim of Appeal.

The above named plaintiff, conceiving himself aggrieved by an order made and entered on the 7th day of October, 1920, in the above entitled cause, does hereby appeal from said order to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 21st day of October, 1920.

ALBERT E. CARTER,
FRED C. PETERSON,
Attorney- for Plaintiff and Petitioner.

The foregoing claim of appeal is allowed.

M. T. DOOLING,
United States District Judge.

Dated this 21 day of October, 1920.

(Endorsed:) Filed Oct. 21, 1920. W. B. Maling, clerk, by C. W. Calbreath, deputy clerk.

12 In the Southern Division of the United States District Court for the Northern District of California, First Division

(No. 16951.)

CHARLES L. BAENDER, Plaintiff and Petitioner,

vs.

FRANK BARNET, as Sheriff of Alameda County, California, Defendant.

Assignment of Errors.

The plaintiff prays an appeal from the final order of this Court to the Supreme Court of the United States, and assigns for error:

1. That the Court erred in sustaining the demurrer to the complaint herein.

2. That the Court erred in denying the petition of plaintiff for a writ of habeas corpus.

ALBERT E. CARTER,
FRED C. PETERSON,
Attorney- for Plaintiff.

(Endorsed:) Filed Oct. 21, 1920. W. B. Maling, clerk, by C. W. Calbreath, deputy clerk.

13 *Certificate of Clerk U. S. District Court to Transcript on Appeal.*

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 12 pages, numbered from 1 to 12, inclusive, contain a full, true, and correct transcript of certain records and proceedings, in the matter of Charles L. Baender, on Habeas Corpus, No. 16951, as the same now remains on file and of record in this office; said transcript having been prepared pursuant to and in accordance with Præcipe for transcript for Appeal, and the instructions of the Attorneys for Petitioner and Appellant herein.

I further certify that the cost for preparing and certifying the foregoing Transcript on Appeal is the sum of Four Dollars and Twenty Five Cents ($4.25) and that the same has been paid to me by Appellant herein.

Annexed hereto is the original Citation on Appeal, issued herein (page 14).

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 4th day of November, A. D., 1920.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk,

By C. M. TAYLOR,
Deputy Clerk.

14 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Frank Barnett, as Sheriff of Alameda County, California, defendant, Greeting:

You are hereby cited and admonished to be and appear at a United States Supreme Court *of* to be holden at the City of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein Charles L. Baender plaintiff and Petitioner is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable M. T. Dooling, United States District Judge for the Northern District of California, this 21st day of October, A. D. 1920.

M. T. DOOLING,
United States District Judge.

15 [Endorsed:] No. 16951. United States District Court for the Northern District of California. Charles L. Baender, Appellant, vs. Frank Barnett, etc., Appellee. Citation on Appeal. Filed Oct. 21, 1920. W. B. Maling, clerk, by C. M. Taylor, deputy clerk.

Receipt of copy this 21st day of October, 1920, is hereby admitted.

FRANK M. SILVA,
U. S. Attorney, Attorney for Appellee.

Endorsed on cover: File No. 27,971. N. California D. C. U. S. Term No. 614. Charles L. Baender, appellant, vs. Frank Barnett, as sheriff of Alameda county, California. Filed November 13th, 1920. File No. 27,971.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 614.

CHARLES L. BAENDER, APPELLANT,

vs.

FRANK BARNET, AS SHERIFF OF ALAMEDA COUNTY, CALIFORNIA, RESPONDENT.

PETITION TO HAVE CAUSE ADVANCED UPON THE CALENDAR.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States and to the Court:

The above-named appellant respectfully states that his appeal in the above matter is now pending in the Supreme Court of the United States; that he has been since May 10, 1920, and now is being imprisoned in execution of a purported judgment of the District Court of the United States for the Southern Division of the Northern District of California; that his present appeal is from a judgment and order of said district court denying his petition for a writ of *habeas*

corpus; that appellant based his petition for discharge under said writ on the contention that the judgment in execution of which appellant is now being restrained of his liberty is void, and that said district court had no jurisdiction over the subject-matter in that cause.

Appellant further respectfully states that he has been denied bail pending the final determination of the matters presented in his said appeal.

Wherefore appellant hereby respectfully petitions this Honorable Court to advance the hearing of the said appeal upon its calendar.

CHARLES L. BAENDER,
Appellant.
ALBERT E. CARTER,
Attorney for Appellant.

[Endorsed:] File No. 27,971. Supreme Court U. S. October Term, 1920. Term No. 614. Charles L. Baender, appellant, *vs.* Frank Barnet, as sheriff, etc. Motion to advance. Filed November 13, 1920.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 614.

CHARLES L. BAENDER, APPELLANT,

vs.

FRANK BARNET, AS SHERIFF OF ALAMEDA COUNTY, CALIFORNIA, RESPONDENT.

PETITION TO BE ADMITTED TO BAIL PENDING THE DETERMINATION OF THE APPEAL OF APPELLANT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States and to the Court:

The above-named appellant respectfully states that his appeal in the above matter is now pending in the Supreme Court of the United States; that he has been since May 10, 1920, and now is being imprisoned in execution of a purported judgment of the District Court of the United States for the Southern Division of the Northern District of California; that his present appeal is from a judgment and order of said district court denying his petition for a writ of *habeas*

corpus; that appellant based his petition for discharge under said writ on the contention that the judgment in execution of which appellant is now being imprisoned is void, and that said district court had no jurisdiction over the subject-matter therein.

Appellant further respectfully states that he made application to said district court to admit appellant to bail pending his said appeal, and that said application was denied by said court; that appellant believes his contention is well founded upon the Constitution of the United States and the decisions of this Honorable Court, and that said appeal is not for the purpose of hindering or delaying any proceeding, and is not frivolous.

Wherefore appellant respectfully petitions this Honorable Court to fix a reasonable bail upon which appellant may be released pending the final determination of the matters in said appeal.

CHARLES L. BAENDER,
Appellant.

ALBERT E. CARTER,
Attorney for Appellant.

[Endorsed:] File No. 27,971. Supreme Court U. S. October Term, 1920. Term No. 614. Charles L. Baender, appellant, vs. Frank Barnet, as sheriff, etc. Motion to admit appellant to bail. Filed November 13, 1920.

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES L. BAENDER,
Appellant,

vs.

FRANK BARNET, as Sheriff of Alameda County, California,
Respondent.

Appellant's Opening Brief

Upon Which the Matter Will Be Submitted.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States, and to the Court:

This is an appeal from a judgment and order of the District Court of the United States for the Southern Division of the Northern District of California, M. T. Dooling, Judge, sustaining a general demurrer to appellant's complaint and petition for a writ of *habeas corpus* and denying the petition. The petition for discharge under the writ is based on the contention that the judgment in execution of which petitioner, appellant here, was and is being restrained of his liberty is void, for the reason that that portion of section 169 C. C. U. S. upon which the indictment in his case was pre-

dicated is invalid under the Fifth Amendment to the Constitution of the United States and the laws enacted thereunder, and because the said District Court had no jurisdiction over the subject matter. *Habeas corpus* is the proper remedy in such cases. In re *Swan*, 150 U. S. 637; in re *Tyler*, 149 U. S. 164; ex parte *Siebold*, 100 U. S., 371. The verified complaint states the facts surrounding appellant's case, and *these are not disputed*. The denial by the court below of appellant's petition was based on the opinion of that court that the clause of the statute involved is constitutional, and this is the only question now presented for determination.

The test of the constitutionality of a statute is not what was done under it but what may be done thereunder. *Minn. Brewing Co.* v. *McGillivray*, 104 Fed. 258; *Rochester* v. *West*, 164 N. Y., 510; *Gilman* v. *Tucker*, 128 N. Y., 190. And this is common sense, for if the statute was invalid when enacted, what was done in appellant's case could not make it valid.

I.

"Whoever, without lawful authority, shall make, or cause or procure to be made, or shall willingly and or assist in making, any die, hub, or mold, or any part thereof, either of steel or plaster, or any other substances whatsoever, in the likeness or similitude as to the design or the inscription thereon, of any die, hub, or mold designated for the coining or making of any of the genuine gold, silver, nickel, bronze, copper, or other coins of the United States, that have been or hereafter may be coined at the mints of the United States; or *who-*

> *ever, without lawful authority, shall have in his possession any such die,* hub, or mold, *or any part thereof,* or shall permit the same to be used for or in aid of the counterfeiting of any of the coins of the United States hereinbefore mentioned, *shall be fined not more than five thousand dollars and imprisoned not more than ten years.* Section 169 C. C. U. S.

As is shown in paragraph VII of the verified complaint, the portion of the statute italicized is that upon which the indictment in appellant's case was based and its validity is the only question here presented. This statute formerly denounced a possession "with intent to fraudulently use the same". These words were "intentionally dropped from the statute" by Congress on the recommendation of the Committee on Revision, and for the reason that the Government should not be required to prove what was in the accused's mind, but that *the accused should be required to explain his possession to the satisfaction of the jury. Baender* v. *U. S.*, 260 Fed., 833. It is important to bear this history and this reason in mind.

It will be seen that possession of a die is criminal under this statute if only *without lawful authority.* Under a strict construction—and this is a penal statute —every person who might obtain or receive possession of such a die, whether by the purchase of some junk in which the die was contained unknown to him, as is admittedly the case here, or whether by having it surreptitiously placed on his person, or in his home, would be

guilty of crime. Under such an interpretation this statute is manifestly void. It is not a revenue measure, nor does it pertain to the class, "Offences Against the Laws of Nations". Yet the Circuit Court of Appeals, while not deciding the question here presented, held that this clause contains all the elements of the offense. *Baender* v. *U. S.*, 260 Fed., 834. But the learned judge of the District Court, in his opinion in this proceeding, tacitly admitting the invalidity when literally construed, contends that the possession intended to be punished is a conscious and willing one in addition to being without lawful authority.

It is axiomatic that Congress could intend to punish only what the Constitution gives it the power to punish. That Instrument provides:

> "The Congress shall have power—to provide for the punishment of counterfeiting the securities and current coin of the United States." Art. 1, Sec. 8, Par. 6.

Hence, unless such a possession, conscious, willing and unauthorized though it be, can be considered as "counterfeiting the current coin of the United States", or some included offense such as an attempt, Congress would have no power to punish it. Where the intent to use the die fraudulently accompanies the possession it could be punished only upon the theory that this would be an *attempt* to counterfeit, and an attempt is part of the act. But, as stated, the "intent" was *pur-*

posely eliminated from the statute. On the other hand, there can be no crime without the intent. This is elemental. What, then, did Congress intend to punish? It is evident that Congress could not and did not intend to punish a mere conscious, willing and unauthorized possession, for the Constitution specifically limits its power to punish *counterfeiting*, and such a possession is no more counterfeiting than a similar possession of a gun would be murder. Nor is it an attempt, for the requisite intent to make it such has been purposely eliminated. From a consideration of the report of the Committee on Revision, the decision of the Circuit Court of Appeals in Baender v. U. S., *supra*, Chap. VII of the Penal Code and the statute itself, it is apparent that Congress intended to make such a possession criminal *unless the defendant could explain the possession to the satisfaction of the jury.* No other conclusion can be logically reached. It is likewise evident that the necessary evil intent was not meant to be inferred from the possession, as is maintained by the Circuit Court of Appeals, at p. 834. It would be extremely illogical, to say the least, to declare that Congress *purposely* deleted from the statute the evil intent, *expressed in plain words*, and then assert that it still remained there concealed as an inference from the "possession." Especially is this true since *it was precisely from the "POSSESSION" that the evil intent was extracted.* Furthermore, possession of a die is not such an act, if it be an act, from which

the evil intent could be inferred, even had Congress not plainly shown that the intent was not to be inferred from "possession." *Kaye* v. *U. S.*, 177 Fed. 150. The conclusion is irresistible that the evil intent was not meant to be inferred by the jury from the possession, but *from the failure of the defendant to satisfactorily explain the possession.*

II.

The Circuit Court of Appeals in Baender v. U. S., supra, has impaled this statute upon two horns of a dilemma, either being fatal. It is asserted, A, "In enacting this statute—Congress intended that it should express all the elements of the crime", p. 834; and B, "Congress evidently intended that the unlawful possession of such dies should be sufficient evidence to warrant conviction, unless the accused could explain the possession to the satisfaction of the jury", p. 833. These two assertions are, at first, contradictory; for, assuming that the statute contains all the elements of the offense, there can be no *explanation* of the possession. The accused could show that he had no possession; that he had lawful authority therefor; or, that it was not conscious or willing, and *that is all.* Under this assumption he could not show that his possession was not for the purpose of "counterfeiting the current coin of the United States", because, this element being eliminated, and the offense being complete without it, testimony on this point would be immaterial.

A. If the statute makes a mere conscious, willing and unauthorized possession criminal, even adding two elements not enumerated, it is invalid. Congress could no more make such a possession of a die criminal than a similar possession of a tin whistle. Under any consideration, *an evil intent must be present to make "possession", or any act, criminal.*

Applying the procedure prescribed in *U. S.* v. *Carl* 105 U. S., 612, an examination of like statutes under the general title "Offences against the Coinage, etc.", Chap. VII of the Penal Code, discloses the intent of Congress. There is not another statute in this chapter in this class, that does not, in prohibiting "possession", express the "intent" in plain words. See Sections 150, 153, 154, 160, 163, 164, 165, 171. Surely, it would be absurd to say that such a possession of a die would be criminal, whereas a similar possession of a plate for printing counterfeit bills *is innocent;* Sec. 150. Manifestly, Congress intended here to punish such a possession only when accompanied by the requisite evil intent. *And that is all that Congress can do.* But by purposely deleting the "intent" from the statute, and particularly *from the "possession"*, Congress manifested its plain determination that the "intent" should not be an element *in the statute.* But in this shape the statute is void for there can be no crime without the evil intent; nor would the statute thus state such a crime as *counterfeiting.* Much more reasonable, but none the less deadly, is the other horn.

B, the accused shall be required to expalin the possession to the satisfaction of the jury. Here, again, the analogy held by the Circuit Court of Appeals to exist between this and the statute prohibiting the possession of imported opium, 38 Stat. 276, Sec. 4, fails at the crucial point. In the latter it is plainly provided that "such possession shall be deemed sufficient to warrant conviction, *unless the defendant shall explain his possession to the satisfaction of the jury.*" In the statute involved here, *no such provision is made.*

> "If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, *does not shut out* from the party affected a reasonable opportunity to submit to the jury in his defense *all* of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."
>
> *Luria v. U. S.*, 231 U. S., 26 (Italics ours).

It is not claimed that the rule of evidence intended to be prescribed here is unreasonable, but it *is* claimed that party is shut out from an opportunity "to submit to the jury in his defense *all* of the facts bearing upon the issue". It is absolutely essential to due process of law that provision for a *complete* defense be made in a statute where, as here, the burden of proof is shifted, instead of limiting the accused to a rebuttal of elements that do not constitute a crime. Neither is it due process of law to leave the matter of a hearing to the discretion of the court, even could it be claimed that this statute does so.

"Nor can—a hearing granted as a matter of favor or discretion be deemed a substantial substitute for the due process of law that the Constitution requires.—*The law must—give the right to a hearing and an opportunity to be heard.* The soundness of this doctrine has repeatedly been recognized by this Court.—The right of a citizen to due process of law must rest upon a more substantial basis than favor or discretion. *The law must save the parties' rights* and not leave them to the discretion of the courts as such." (Italics ours).

Coe v. *Armour Fertilizer Works*, 237 U. S., 424, 425.

12 *Corpus Juris*, pp. 1234, 1235, with more than 500 authorities upon the point.

III.

Since the test to be applied to determine the validity of a statute is *what may be done under it*, and the evil intent being here eliminated, a person who finds such a die, or some part thereof, made of wood, putty, "steel or plaster, or any other substance whatsoever", *one-eighth of an inch or five feet in diameter*, and retains it as a curio, knowing or not knowing it to be a *die*, or some part thereof, would be guilty of crime under this statute if that die, or part, is "in the likeness—as to the—inscription thereon" of any properly designated die. It might be absolutely impossible to use it for counterfeiting purposes. And he would be equally guilty if he purchased some junk for use in his factory in which the die, unknown to him was contained, and found it later and placed it to one side with

the intention to subsequently turn it over to the police, or with no special intention at all. It can be readily seen that the accused must have the *statutory* right to explain to the jury not only his possession, but also the die, and "all of the facts bearing upon the issue", to show that his possession was not for the purpose of committing an "offence against the coinage". So, too, that the jury will not be compelled, by an arbitrary rule, to accept a mere conscious, willing and unauthorized possession as alone sufficient as a basis for their verdict. The Constitution provides that the trial of all crimes, except in cases of impeachment, shall be by jury." Art. III, Sec. 2, Par. 3. And, of course, this means that it shall be the *judgment* of the jury that shall be exclusively determinative of the guilt of the accused. But, under this statute, *no provision for an explanation having been made*, the jury is compelled by an arbitrary rule to convict. The statute makes the guilt *conclusive* upon proof of a mere conscious, willing and unauthorized possession, conceding two elements not mentioned, and the conviction would not be by the *judgment* of the jury as the Constitution provides, but *by Congress*.

> "It is not sufficient to declare that the statute does not make it the *duty* of the jury to convict.—The point is that in such a case the statute *authorizes* the jury to convict. It is not enough to say that the jury may not accept that evidence as alone sufficient, for the jury may accept it. And they have the express warrant of the statute to accept it as a basis for their verdict. And it is in this

light that the validity of the statute must be determined.—The normal assumption is that the jury will follow the statute and, acting in accordance with the authority it confers, will accept as sufficient what the statute expressly so describes.—So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed."

Bailey v. *Alabama*, 219 U. S., pp. 235, 237, 239.

Luria v. *U. S.*, 231 U. S., pp. 25, 26.

The last sentence of this ruling decision is particularly applicable here, for by this statute the party is certainly precluded from the right to present his defense to the main fact thus presumed—his guilt—for the *law* has not saved his rights. There can be no objection to a proper shifting of the burden of proof, but when, as here, the party is precluded from making the very proof shifted upon him the courts should not hesitate to interfere.

"As to presumptions, of course the legislature may go a good way in raising one, or in changing the burden of proof, but there are limits. It is essential that there shall be some rational connection between the fact proved and the fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.—It is not within the province of a legislature to declare an individual guilty or presumptively guilty of crime."

McFarland v. *Am. Sugar Ref. Co.*, 241 U. S., p. 86.

Luria v. *U. S.*, 231 U. S., p. 26.

There is certainly no rational connection between the "possession" considered here and "counterfeiting the current coin of the United States", for that very intent has been *purposely* dropped. And, to make the crime complete, the jury is confronted by the paradoxical proposition of inferring the evil intent, *not from the possession*, but from an explanation which the accused has been precluded from making. The result is that a defendant is declared conclusively guilty of crime upon proof of an innocent possession. A long line of decisions might be given here upon the point that a statute which arbitrarily prescribes that certain acts, innocent in themselves, shall constitute a crime, is void. Forbearance in this respect will be a virtue.

IV.

In *Kilbourne* v. *State*, 84 Ohio St. Rep., 247, the following statute was declared invalid by the Supreme Court of that State:

> "Whoever buys, receives, or unlawfully has in his possession any of the aforesaid articles, (nuts, bolts, journal-brasses, etc), shall upon conviction thereof, be imprisoned in the penitentiary not more than five years or less than one year, or not more than six months in the county jail or workhouse at the discretion of the court, which is hereby authorized to hear testimony in mitigation or aggravation of sentence." (Insert ours).

It will be noted that this clause is on all fours with that considered here, the only difference being in the

article the possession of which is prohibited. It might also be pertinent to note that a possession without lawful authority is not necessarily unlawful, but becomes so when accompanied by an evil intent.

In conclusion, the statute is void (a), if it contains all the elements of the offense, because such a possession is not criminal. The requisite evil intent having been purposely eliminated, the statute thus is ineffective to state an offense; (b), if the accused is required to explain his possession, from a failure of which the evil intent is to be inferred, he has been denied due process of law in having been shut out from making the explanation required. And in this case the jury is authorized by the statute to convict upon proof of facts which, *admittedly*, would not constitute a crime. And, if the clause of the statute involved here is invalid, then the court below had no jurisdiction of the subject matter, and the judgment based upon it, in execution of which appellant is being confined, is void.

Respectfully submitted upon this printed argument,

ALBERT E. CARTER,

Attorney for Appellant.

Signed at Oakland, Calif., Nov. 11, 1920.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 614.

CHARLES L. BAENDER, APPELLANT,

vs.

FRANK BARNET, AS SHERIFF OF ALAMEDA COUNTY, CALIFORNIA, RESPONDENT.

APPELLANT'S ADDITIONAL BRIEF.

The case of *U. S. vs. Arjona*, cited in the opinion of the court below, is not pertinent, because the question here was neither presented nor decided there. All that was there decided is that Congress has power to punish crimes against the currency of foreign nations under its constitutional power to "define and punish offenses against the law of nations." Without discussing what Congress may or may not do under this authority, whether it may or may not have police power as to other nations, it will suffice to say that under authority to *define* and punish an offense it has greater latitude than in this case, where its power is limited to the punishment of an offense already defined.

There are now three different interpretations of the clause in issue here. Two are by the Circuit Court of Appeals (Brief, p. 6). In the third the District Court, in its opinion

here, reads two elements into the statute and holds that, thus enlarged, the statute is complete. Which of these three constructions is correct, if any? Where a statute is so vague, uncertain, and ambiguous that the courts cannot agree on its meaning, and under which an accused, consequently, cannot be informed of the nature of the charge against him, so that he may make his defense, the statute is just as void as an indictment would be which is similarly defective. To subject an accused to a criminal prosecution under a statute which makes him guilty, (1) regardless of the evil intent, (2) by a construction that possession alone, if without authority from the Secretary of the Treasury, is conclusive proof of his intent to counterfeit, and (3) if he fails to satisfy the jury or court of his innocence by an explanation which the statute fails to even suggest he must make, and which he is precluded from making, and which, if made, the jury and court are authorized by the statute itself to ignore, is surely not due process of law within the meaning of the Fifth Amendment. That is exactly what was done in appellant's case, although it is entirely immaterial what was done in his case, in so far as the validity of the statute is concerned. The record shows, also, that appellant was sentenced for a possession *admittedly* without an evil intent. However, the Circuit Court of Appeals, realizing the necessity for an evil intent to make the possession criminal, read back into the statute the intent which Congress had, by special revision, said should not be there (Baender *vs.* U. S., 260 Fed., 834). It then affirmed the judgment after thus injecting into appellant's case a vital element which was neither charged nor proved and which he always contended should have been charged in the indictment in order to allege an offense, especially *since the burden of proof was not shifted by the statute, but it remained with the prosecution to show the requisite evil intent.* For a statute to arbitrarily prescribe that "whoever, without lawful authority, shall have in his possession any such die," without more, is guilty of a felony, is a denial of the constitutional right of trial by jury, for here

the verdict of the jury and decision of the court have already been predetermined by Congress.

There is only one construction to be given this clause: Congress intended to make the unauthorized possession *prima facie* evidence of guilt and require the party to rebut this presumption. Guilt of what? Of an attempt to counterfeit "the current coin of the United States." Congress then simply neglected to make provision for a defense, thus making the presumption irrebuttable. If the accused is to prove his innocence, why read any elements into the statute? Proof of mere possession would be sufficient to establish the presumption, which could then be *completely* rebutted, if the statute had not made it irrebuttable, by a showing that the possession was not with an intent to use the dies for the purpose of "counterfeiting the current coin of the United States." To make such a showing now is useless, for the courts are authorized by the statute to refuse to instruct the jury to acquit the accused unless they find the accused held possession of the dies with an evil intent. That the court below would refuse to so instruct the jury is evident from its opinion in this case.

A statute is void which makes the presumption of guilt irrebuttable. *Bailey vs. Alabama*, 219 U. S., 219; *McFarland vs. American Sugar Refining Co.*, 241 U. S., 79; *In re Ah Jow*, 29 Fed., 181; *Kilbourne vs. State*, 84 Ohio St. Rep., 247; *State vs. Beswick*, 13 R. I., 211; *Gillespie vs. Peo.*, 188 Ill., 176; *Coffeyville, etc., vs. Perry*, 69 Kan., 297; *Peo. vs. Armstrong*, 73 Mich., 288; *State vs. Julow*, 129 Mo., 163; *Crossman vs. Canning*, 79 N. Y. S., 900; *Matter of Morgan*, 99 N. Y. S., 775; *In re Opinion of Justices*, 208 Mass., 619 *State vs. Griffin*, 154 N. C., 611.

Respectfully submitted,

ALBERT E. CARTER,
Attorney for Appellant.

FILE COPY

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MEMORANDUM BRIEF FOR APPELLANT.

LEVI COOKE,
Washington, D. C.,
Attorney for Appellant.

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MEMORANDUM BRIEF FOR APPELLANT.

The penal provision under which appellant was indicted is Section 169, Criminal Code (35 Stat. L., 1120). That Section reads as follows:

> "(Counterfeiting, etc., dies for coins of United States.) Whoever, without lawful authority, shall make, or cause or procure to be made, or shall willingly aid or assist in making, any die, hub, or mold, or any part thereof, either of steel or plaster, or any other substance whatsoever, in likeness or similitude, as to the design or the inscription thereon, of any die, hub, or mold designated for the coining or making of any of the genuine gold, silver, nickel,

bronze, copper, or other coins of the United States, that have been or hereafter may be coined at the mints of the United States; *or whoever, without lawful authority, shall have in his possession any such die, hub, or mold, or any part thereof,* or shall permit the same to be used for or in aid of the counterfeiting of any of the coins of the United States hereinbefore mentioned, *shall be fined not more than five thousand dollars and imprisoned not more than ten years.*"

This Section of the Criminal Code is a codification of Section 1 of the Act of Feb. 10, 1891 (26 Stat. L., 742). That Section reads as follows:

"That every person who, within the United States or any Territory thereof, makes any die, hub, or mold, either of steel or plaster, or any other substance whatsoever in likeness or similitude, as to the design or the inscription thereon, of any die, hub, or mold designated for the coining or making of any of the genuine gold, silver, nickel, bronze, copper or other coins of the United States that have been or hereafter may be coined at the mints of the United States, or who willingly aids or assists in the making of any such die, hub, or mold, or any part thereof, or who causes or procures to be made any such die, hub or mold, or any part thereof, without authority from the Secretary of the Treasury of the United States or other proper officer, *or who shall have in his possession any such die, hub, or mold with intent to fraudulently or unlawfully use the same,* or who shall permit the same to be used for or in aid of the counterfeiting of any of the coins of the United States hereinbefore mentioned shall, upon conviction thereof, be punished by a fine of not more than five thousand dollars and by imprisonment at hard labor not more than ten years, or both, at the discretion of the court."

Section 341 of the Criminal Code, the Repealing Section, repealed the Act of Feb. 10, 1891, last quoted.

In both Sections, *i. e.,* the Criminal Code Section and the

Section which it replaced, we have italicized the provision, first, in the Criminal Code Section under which appellant was indicted, and, secondly, the provision in the Act of Feb. 10, 1891, which the former replaces.

The Court will note that in the present Criminal Code Section the bare, naked possession of a die, hub, or mold, without lawful authority, is made a crime; but the Court will note that the former provision made such possession unlawful only when it occurred "with intent to fraudulently or unlawfully use the same." It may also be pointed out, in this connection, that Section 169 of the Criminal Code creates four separate states of facts as constituting an offense.

First, the making or causing to be made, without lawful authority, of any die, hub, or mold. Such act obviously can occur only with intention, as it is a positive act requiring volition.

Secondly, willingly aiding or assisting in making any die, hub, or mold. Congress here uses the word "willingly," and the act again is a positive act requiring volition.

The third offense is the mere naked possession, the validity of which as an offense we are concerned with in this case.

The fourth and last offense is the act of permitting a die, hub, or mold to be used for or in aid of counterfeiting. This, likewise, is a positive act requiring volition.

The Committee on Revision, which reported the Criminal Code, expressly and purposely eliminated from this Section the element of intent, fraudulently or unlawfully to use the die, hub, or mold. The report of the Committee in this respect is as follows:

> "In the cases of United States *v.* Keller and others, charged, among other things, with having in their possession dies for counterfeiting the coin of some of the South American republics, the District Court for the Southern District of New York held that to constitute an offense under Section 2 of the Act of Feb.

> 10, 1891, it was not only necessary to show the possession of the dies by the defendants, but also that they had them in possession 'with intent to fraudulently or unlawfully use' them in making counterfeit coin. The Court further points out the doubt which arises as to the construction of the Section because of the arrangement of the language thereof. While the criticism of the Court is directed against Section 2 of that Act, it also applies, in a less degree, to Section 1, which relates to the making of dies, etc., for counterfeiting the coin of the United States. To remove this doubt the Committee has transposed the language in both Sections, and has dropped from each Section the words 'with intent to fraudulently use the same,' and by transposing and repeating the words 'without lawful authority.' The Committee believes that a person who has in his possession dies which may be used in counterfeiting any coin should be required to show that his possession is lawful, and that the Government should not be required to prove that he has them in possession 'with the intent to fraudulently and unlawfully' use them for counterfeiting."
>
> See 7 Federal Statutes, Annotated, (Second Edition), 730, *note*.

It is thus patent that Congress meant the Statute to erect an offense against the United States, with the element of intention and, by the words used, even the element of knowledge eliminated. The Court of Appeals in its opinion in this case said: "Congress evidently intended that the unlawful possession of such dies should be sufficient evidence to warrant conviction, unless the accused could explain the possession to the satisfaction of the jury," and likened the provision to that in the Harrison Narcotic Act of Jan. 17, 1914, providing that possession of imported opium should be deemed sufficient evidence to warrant conviction, unless the defendant shall explain the possession to the satisfaction of the jury. This, it is submitted, is an erroneous view, and taking the Committee's report as indicating the object of

the language, we find that the Committee expressed the belief that a mere possessor should be required to show that his possession is lawful. The Act, however, makes the mere possessor a violator of law if he possesses without lawful authority; and ignorant possession, as in this case, is possession within the prohibition of the Act which cannot be proved to be by lawful authority; and the accused has not even the opportunity furnished by the Harrison Narcotic Act to explain his possession to the satisfaction of the jury.

The mere naked possessor, possessing with no knowledge whatever that he has the die, hub, or mold in his possession, is foreclosed to make any explanation to the jury except to show lawful authority. Having possession and failing to show to the jury lawful authority therefor, he is of necessity guilty, even though he was absolutely ignorant that the die, hub, or mold had come into his possession. It is submitted that the Circuit Court of Appeals has read into the Section provisions and meanings not present therein, but has, in fact, read the Section as if it had not been amended, as Congress did amend it in the codification, or by substituting in the present language a part of the entire concept of intent and fraud which Congress eliminated in toto. This Court said in United States *ex rel.* Attorney General *vs.* Delaware and Hudson Company, 213 U. S., 366-414, that it could not in reason be assumed that it is a duty to extend the meaning of a Statute beyond its legal sense, upon the theory that a provision which was expressly excluded was intended to be included. In that case a construction of the commodity clause was being urged, which would have existed if an amendment had been adopted which Congress had expressly rejected. Certainly, this rule of construction applies all the more forcibly to a Statute which, in codification, has had eliminated from its text an express provision. Certainly, at no later time can it be held by the Court that the provision expressly eliminated is to be found present, either in whole or in part, by mere judicial construction and inclusion in the codified provision of that which has been expressly elimi-

nated. It is plain that Congress meant to eliminate knowledge or intention, and did so by clear excision of the prior provision in this regard. Congress left a mere naked prohibition of possession without express lawful authority therefor. And thus a defendant is convicted because his possession without knowledge, and with complete innocence of any wrongful intention, is charged in the language of the Statute; and, if the Statute be good, he is bound to be convicted. As above stated, there is even not the sorry recourse furnished in the Harrison Narcotic Act, to "explain the possession to the satisfaction of the jury." Under the words of the Statute, the defendant is guilty unless, however ignorant of his possession he may have been, he can show lawful authority.

The Circuit Court of Appeals of the Seventh Circuit, in Kaye *vs.* United States, 177 Federal, 147, in considering the Section which this Section at bar displaces, and the question of intent in the several offenses therein created, said:

> "But respecting possession the matter is inherently different. There are many circumstances under which persons might come into possession of counterfeiting molds, either without knowledge of their character, or with such knowledge but without intent to use them fraudulently or unlawfully, as, for instance, the officers who took and held possession of the molds in question. *Mere possession is inherently colorless;* but the making of counterfeiting implements is inherently wrong, or at least was a proper matter for Congress to make wrong, as Congress unmistakably has done."
>
> *Loc. cit.*, 150.

For the information of the Court, we print, as an appendix to this brief, the opinion of the Circuit Court of Appeals in Baender *vs.* United States, 260 Federal, 832.

Respectfully submitted,

LEVI COOKE,
Attorney for Appellant.

APPENDIX.

BAENDER

v.

UNITED STATES.

260 Fed., 832.

Before GILBERT, Ross, and HUNT, Circuit Judges.

GILBERT, *Circuit Judge:*

The plaintiff in error pleaded guilty and was sentenced upon an indictment which charged that at a date and place named he did then and there unlawfully, wilfully, knowingly, and feloniously and without lawful authority have in his possession six complete steel dies, each of which was then and there in the likeness and similitude as to the design and the inscription thereon of a die designated for the coining and making of the genuine Indian head design gold coins of the United States, that had theretofore and are now coined at the mints of the United States, and known as and called $5 pieces or half eagles. The plaintiff in error by writ of error seeks to review the judgment, and he contends that the judgment is void for the reason that the indictment fails to allege an offense against the United States, in that it contains no averment that the plaintiff in error had possession of the dies with the intent to defraud, or to use the same in making counterfeit coins. The statute under which the indictment is brought is Act March 4, 1909, c. 321, Sec. 169, 35 Stat., 1120 (Comp. St., Sec. 10339), which provides that:

> "Whoever, without lawful authority, shall have in his possession any such die, hub or mold, or any part thereof, or shall permit the same to be used for or in aid of the counterfeiting of any of the coins of the

United States hereinbefore mentioned, shall be fined," etc.

Act Feb. 10, 1891, c. 127, Sec. 1, 26 Stat., 742, which was in force prior to the enactment of the act of 1909, had denounced as unlawful the possession of the prohibited dies, etc., with intent to fraudulently or unlawfully use the same. In amending the law by the later act, the report of the committee on revision shows that the words "with intent to fraudulently use the same" were "intentionally dropped from the statute"; the committee believing that a person who has in his possession dies which may be used for counterfeiting any coin shall be required to show that his possession is lawful, and that the government should not be required to prove that he has them in his possession with the intent to use them fraudulently and unlawfully for counterfeiting. Congress evidently intended that the unlawful possession of such dies should be sufficient evidence to warrant a conviction, unless the accused could explain the possession to the satisfaction of the jury.

The statute here involved has analogy to Act Jan. 17, 1914, c. 9, 38 Stat., 275, amending Act Feb. 9, 1909, c. 100, 35 Stat., 614 (Comp. St. 1918, Secs. 8800-8801*f*), and providing that possession of imported opium shall be deemed sufficient evidence to warrant conviction, unless the defendant shall explain the possession to the satisfaction of the jury. Under that statute convictions have been sustained on proof of possession; the courts ruling that the statute provides for a presumption of *prima facie* proof of the offense which, while sufficient to satisfy the jury of the guilt of the accused, applying the doctrine of Luria *v.* United States, 231 U. S., 9; 34 Sup. Ct., 10; 58 L. Ed., 101, where it was held that the establishment of a presumption from certain facts prescribes a rule of evidence, and not one of substantive right, and that if the inference is reasonable, and opportunity is given to controvert the presumption, it is not a denial of due process of law. United States *v.* Yee Fing (D. C.)

222 Fed., 154; United States *v.* Ah Hung (D. C.), 243 Fed., 762; Gee Woe *v.* United States, 250 Fed., 428; 162 C. C. A., 498.

It is true that, in all cases in which a specific intent is made part of the offense by the statute creating it, it must be alleged, but in cases where the act includes the intent it is sufficient to charge the offense in the language of the statute, and the intent will be inferred. 22 Cyc., 329; King *v.* Philipps, 6 East, 464; People *v.* Butler, 1 Idaho, 231; People *v.* O'Brien, 96 Cal., 171; 31 Pac., 45; State *v.* McBrayer, 98 N. C., 623; 2 S. E., 755; Commonwealth *v.* Hersey, 2 Allen (Mass.), 173, 180. In the case last cited it was said:

> "When by the common law, or by the provision of a statute, a particular intention is essential to an offense, or a criminal act is attempted, but not accomplished, and the evil intent only can be punished, it is necessary to allege the intent with distinctness and precision, and to support the allegation by proof. On the other hand, if the offense does not rest merely in tendency, or in an attempt to do a certain act with a wicked purpose, but consists in doing an unlawful or criminal act, the evil intention will be presumed and need not be alleged, or, if alleged, it is a mere formal averment, which need not be proved."

In enacting the statute under which this indictment is brought, Congress intended that it should express all the elements of the crime, and that the prosecution, having shown the unlawful possession by the accused, should not be required to prove what was in the latter's mind as to future use of the things so possessed, and that a criminal intent is to be inferred from the unlawful possession.

It is well settled that under the section of the statute which makes unlawful the forging of coins it is unnecessary to allege an intent. United States *v.* Otey (C. C.), 31 Fed., 68; United States *v.* Russell (C. C.), 22 Fed., 390; United States *v.* Peters, 2 Abb. (U. S.), 494; Fed. Cas. No. 16035. But counsel for the plaintiff in error attempts to distinguish the

present case by asserting that the offense which is here charged is not an act of the accused, so that intention may be imputed to it. To this we cannot agree. To have possession is to maintain in physical control, and it implies both will and action on the part of the possessor. Kaye *v.* United States, 177 Fed., 147; 100 C. C. A., 567, is not in point. That case arose under the statute of February 10, 1891.

The plaintiff in error admitted by his plea in the court below the truth of the indictment. We hold that the indictment is sufficient to sustain the judgment. People *v.* White, 34 Cal., 183; Sutton *v.* State, 9 Ohio, 133; Reg. *v.* Harvey, 11 Cox, C. C., 662.

The judgment is affirmed.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 614.

CHARLES L. BAENDER, APPELLANT,

vs.

FRANK BARNET, AS SHERIFF OF ALAMEDA COUNTY, CALIFORNIA, RESPONDENT.

SUPPLEMENTAL BRIEF ON JURISDICTION IN THE SUPREME COURT TO CONSIDER THE VALIDITY OF THE ACT ON THIS APPEAL FROM THE DENIAL OF A PETITION FOR WRIT OF HABEAS CORPUS.

This supplemental brief is filed after argument by permission of court on the jurisdictional question here.

In *Ex parte* Siebold (*Habeas Corpus* Cases), 100 U. S., 371, judges of election in the city of Baltimore were tried and convicted in the Circuit Court of the United States for the District of Maryland. They applied to this court for the writ of *habeas corpus*. This court, speaking by Mr. Justice Bradley (page 376), said:

"Without attempting to decide how far this may be regarded as law for the guidance of this court, we are clearly of opinion that the question raised in the cases before us is proper for consideration on *habeas corpus*. The validity of the judgment is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. *An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void and cannot be a legal cause of imprisonment.* It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. *But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive, but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on habeas corpus by a superior court or judge having authority to award the writ.* We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We think so, because, if the laws are unconstitutional and void, the circuit court acquired no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon these laws." Italics ours.)

In *Ex parte* Yarbrough (110 U. S., 651), this court examined, on a petition for writ of *habeas corpus*, the validity of an act of Congress under which petitioners had been convicted and sentenced in the Circuit Court of the United States for the Northern District of Georgia. Mr. Justice Miller, for the court, said:

"This, however, leaves for consideration the more important question, the one mainly relied on by counsel for petitioners, whether the law of Congress, as found in the Revised Statutes of the United States, under which the prisoners are held, is warranted by

the Constitution or, being without such warrant, is null and void.

"If the law which defines the offense and prescribes its punishment is void, the court was without jurisdiction and the prisoners must be discharged." (*Loc. cit.*, 654. Italics ours.)

In Minnesota *vs.* Barber (136 U. S., 313), this court on writ of *habeas corpus* reviewed an appeal from the judgment of the Circuit Court for the District of Minnesota discharging, under a writ of *habeas corpus*, a person imprisoned under a conviction before a justice of the peace in Minnesota, on the ground that the Minnesota act was unconstitutional.

In *Ex parte* Medley (134 U. S., 160), this court granted a petition for a writ of *habeas corpus* and ordered a prisoner discharged from imprisonment who had been convicted under an unconstitutional act of the legislature of Colorado.

While this court has said that the writ of *habeas corpus* cannot be used in lieu of a writ of error (*Ex parte* Carll, 16 Otto, 521), so as to review ordinary errors occurring in the case (Collins *vs.* Johnston, 237 U. S., 502, although in that case the court went fully into the merits) and will not interpose the writ of *habeas corpus* where the petitioner has not yet invoked the action of the trial court upon the pleadings (*Ex parte* Lancaster, 137 U. S., 393), and has said that errors committed in a State court, not affecting the jurisdiction of the court, are not reviewable on *habeas corpus* (Wood *vs.* Brush, 140 U. S., 278), it has been held that the writ could be invoked in order to protect the petitioner from imprisonment under an unconstitutional law, either State or Federal, and the cases show that, while the rule against using the writ of *habeas corpus* to take the place of writ of error is preserved, this rule does not under the cases first above cited apply where the very law under which imprisonment occurs is alleged to be unconstitutional and void, no court in case the law be void having any jurisdiction to sentence the prisoner.

In *Ex parte* Royall (117 U. S., 241), Mr. Justice Harlan for the court stated that it was clear that if the local statute under which petitioner was indicted was repugnant to the Constitution, the prosecution against him had nothing upon which to rest, and the entire proceeding was a nullity, and the court cited with approval the Siebold and Yarbrough cases, *supra*.

We find that this court has considered cases and adjudicated them on the merits, both in petitions originally presented to this court and on appeal from the inferior courts, both on cases arising under Federal acts and on cases arising under State acts, where the prisoners had been convicted and sentenced and then by a petition for a writ of *habeas corpus* claimed their liberty, on the ground that the act denouncing the offense for which they were sentenced was unconstitutional and void.

The language used by Mr. Justice Pitney in Collins *vs.* Johnston (237 U. S., 505), that "it is unnecessary to enlarge upon the doctrine, thoroughly established and recently restated, that in *habeas corpus* proceedings we are confined to the examination of fundamental and jurisdictional questions, and that the writ cannot be employed as a substitute for a writ of error," citing Frank *vs.* Mangum, 237 U. S., 309, covers those cases in which mere error is attempted to be reviewed, although, as stated, the court in the Collins case did go into the merits; but counsel for the appellant in this case is convinced that the clear distinction is made in the judgments of this court, that where petitioner grounds his claim to liberty on the unconstitutionality of the act, by virtue of which alone he is imprisoned, review can be had by writ of *habeas corpus* after conviction, whether he has pursued his remedy by way of writ of error or not, at any time during the proceedings. The fundamental thing is his claim that he is in prison under a void act.

There are cases holding that the Federal court will not

interfere with the writ of *habeas corpus* in behalf of a prisoner accused in a State court until he has exhausted his relief within the State courts (Markuson *vs.* Boucher, 175 U. S., 184; Whitten *vs.* Tomlinson, 160 U. S., 231). The case at bar is a case, however, exclusively within the Federal system. The petitioner is now imprisoned, and asserts his right to be liberated on the sheer ground of the unconstitutionality of the act. Applying the rule above quoted from *Ex parte* Siebold, as pronounced by Mr. Justice Bradley, it is respectfully submitted that the court should find here that it is not considering any question of mere error but, as mentioned by Mr. Justice Pitney in Collins *vs.* Johnston, "fundamental and jurisdictional questions," and is dealing with a conviction and present imprisonment, not merely erroneous but, if the act be unconstitutional, a conviction and present imprisonment that are illegal and void.

The court will note that the district judge below conceived that there there was no question presented on this petition for the writ of *habeas corpus* as to the court's jurisdiction under the circumstances to entertain the petition, but decided the case without this question being raised on the merits of the validity of the act. It is submitted that this court should take jurisdiction and consider the merits as to the validity of the third clause of section 169 of the Criminal Code.

As to the Meaning of the Words "Without Lawful Authority," Appearing in the Third Clause in Section 169.

The words "without lawful authority," appearing in section 169, do not furnish a provision excusing ignorant possession from the inhibition and punishment of the section.

The only possession "with lawful authority" must be possession by a workman in the mint or other officer of the Government, or a person who could show official authority for having dies, hubs, or molds in his possession.

Ignorant possession, as claimed in this case and asserted to the court below at time of conviction, could, of course, never be possession with lawful authority. Any person in possession of these articles, except one with express authority from official source, is a violator of the section, however innocent and without knowledge or intent the possessor may be.

It is submitted again, as stated on argument and briefs, that the various constructions of the section attempted by the courts below, so as to read into the section the element of intent, said to have been acknowledged by the prisoner on his so-called plea of guilty, amount to judicial amendment of the provision in the attempt to make the law valid; and that these constructions or any occurrence in the proceedings below cannot be tolerated to give the effect of validity to an otherwise invalid act, when Congress has expressly eliminated the element of knowledge and intent from the offense attempted to be created, and left the accused helpless to escape conviction except it be by the grace and discretion of the court, or the generosity of the jury. *See cases cited on principal brief for appellee.* No plea of guilty in regular or irregular form to a charge under a void act can make the act speak as good law, and any imprisonment thereunder must be illegal.

Conclusion.

In conclusion, it is submitted that appellant is entitled to an examination by this court of the merits of his case on his appeal from the denial of his petition for a writ of *habeas corpus;* and that the third clause of section 169 of the Criminal Code, under which he is imprisoned, is unconstitutional and void.

Respectfully submitted,

LEVI COOKE,
Attorney for Appellant.

Filed January 13, 1921.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

CHARLES L. BAENDER, APPELLANT,
v.
FRANK BARNETT, SHERIFF, ETC. } No. 614.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE APPELLEE.

STATEMENT.

Before advancing to a consideration of the questions sought to be raised by appellant in his present appeal, it seems proper that this court should be apprised of the prior history of the case. Appellant entered a plea of guilty to an indictment which charged that he did "then and there unlawfully, willfully, knowingly, and feloniously, and without lawful authority have in his possession six complete steel dies, each of which was then and there in the likeness and similitude as to the design and the inscription thereon of a die designated for the coining and making of

genuine Indian head design gold coins of the United States," etc. He also filed a demurrer attacking the sufficiency of the indictment, which was overruled, as was also a motion in arrest of judgment. He carried his case to the Circuit Court of Appeals on writ of error. The opinion of that court in 260 Fed. 832 discloses that appellant there, as here, attacked the indictment and statute because of the omission of an allegation that he intended to use the dies to defraud or in the making of counterfeit coins. The appellate court, however, rejected the contention, and affirmed the judgment of conviction. A petition for rehearing was denied. He thereupon applied to this court for a writ of certiorari. In his petition he urged substantially the same constitutional grounds upon which he now relies to have the judgment of conviction upset, but this court denied the writ. (252 U. S. 586.) The refusal of the writ justifies the assertion that the constitutional questions were considered by this court as frivolous, and upon that ground the present appeal should be dismissed. Moreover, viewed in the light of the above history of the case, it is clear that appellant is now seeking to convert a writ of habeas corpus into a writ of error. This he may not be permitted to do. To countenance the practice adopted by appellant in the case at bar is to open the way for a review through two distinct judicial proceedings

of the same questions. With this preliminary statement we proceed to a discussion of the merits.

ARGUMENT.

I.

Congress possesses constitutional power to prohibit, under penalty, mere unlawful possession of the dies here involved even though there be no intent to use such dies unlawfully.

1. At the very outset it is important to bear in mind that appellant pleaded guilty to an indictment charging him with possessing the dies "unlawfully, wilfully, knowingly and feloniously." Therefore, in determining the validity of section 169 of the Criminal Code, upon which the indictment rests, no consideration can be given to the emphasis which appellant, in his brief, seeks to lay upon hypothetical cases which he contends the statute might be made to cover, and if so, would render the statute invalid. This court has repeatedly announced the rule that a party seeking to show the invalidity of an act if applied to a certain class, must bring himself within that class. (*Collins* v. *Texas,* 223 U. S. 288, 295, 296; *Flint* v. *Stone Tracy Company,* 220 U. S. 108, 177.) Appellant did not possess the dies lawfully or unknowingly. Therefore, he can not be heard to argue that the statute is invalid because, from his point of view, it is capable of being applied to one who had such dies "surreptitiously placed on his

person or in his home." (Appellant's brief, pp. 3 and 4.) It is true that in his petition for a writ of habeas corpus he states he explained to the court that the dies were among some junk which he purchased, but the demurrer to the petition does not admit the truthfulness of such explanation, but the mere fact that he made the explanation. The trial court, however, was justified in rejecting the explanation either (1) because it did not believe the explanation, or (2) because the explanation was utterly inconsistent with his plea of guilty. In other words, choosing to stand upon his plea of guilty, he could not be heard to say by way of oral explanation that he was not guilty. This was the disposition of the point made by the court below on habeas corpus. (R. p. 5.)

2. We come then to the question whether Congress may constitutionally, as it has sought to do in section 169 of the Criminal Code of the United States, prohibit under penalty, the *conscious unlawful possession* of the dies therein described. It is appellant's contention that the power of Congress is restricted by the Constitution to providing "for the punishment of counterfeiting the securities and current coin of the United States," and that mere unlawful possession of dies is not closely enough connected with counterfeiting to authorize Congress to punish it as a crime. The contention overlooks the fact that in a separate paragraph of the same Article I, section 8, Congress is given sole power, among other things, "to coin money." This

power necessarily embraces the utilization of every reasonable means to protect to the utmost the instruments, viz, the dies used in coining money, and to forbid others from possessing such dies or replicas of them. If this be not so, then the power of coinage is less complete than other powers conferred by the Constitution, but in no broader terms. On principle the point seems specifically determined by *United States* v. *Arjona,* 120 U. S. 479, 483, in which this court held that under the law of nations, Congress possessed the power to punish mere "having in possession a plate from which may be printed counterfeits of the notes of foreign banks," etc. Surely the power of Congress to coin money is not less embracing in the matter of protecting the instruments, viz, dies used in such work. Nor is that power pared down by the constitutional provision authorizing the punishment of counterfeiting, assuming arguendo as asserted by appellant, that mere possession of dies is too remote from the act of counterfeiting to be connected therewith. Is it not true that the provision of the Constitution authorizing Congress to provide for the punishment of counterfeiting, is merely declaratory of a power necessarily embraced in the power to coin money? There seems no escape from the conclusion that the power of Congress to coin money carries with it the power to forbid others to do so. And if it may forbid others from coining money, necessarily to effectively prohibit, it may forbid the possession of dies capable of no other use than in

coining money. It is far afield to argue, as appellant does, that the specific power to punish counterfeiting can be used to pare down and render somewhat impotent the specific power to coin money. Stated somewhat differently, if section 169 of the Criminal Code is a proper exercise, as it clearly seems to be, of the power to coin money, then such exercise is not to be rendered nugatory because in a separate clause power to punish the distinct act of counterfeiting is conferred. The point is well illustrated by the following excerpt from *Legal Tender Cases,* 12 Wall. 457, 544, 545:

> They claim that the clause which conferred upon Congress power "to coin money, regulate the value thereof, and of foreign coin," contains an implication that nothing but that which is the subject of coinage, nothing but the precious metals can ever be declared by law to be money, or to have the uses of money. If by this is meant that because certain powers over the currency are expressly given to Congress all other powers relating to the same subject are impliedly forbidden, we need only remark that such is not the manner in which the Constitution has always been construed. On the contrary, it has been ruled that power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relating to the same subject, less comprehensive. There an express power to punish a certain class of crimes (the only direct reference to criminal legis-

> lation contained in the Constitution) was not regarded as an objection to deducing authority to punish other crimes from another substantive and defined grant of power. There are other decisions to the same effect. To assert, then, that the clause enabling Congress to coin money and regulate its value tacitly implies a denial of all other power over the currency of the nation is an attempt to introduce a new rule of construction against the solemn decisions of this court.

See *United States* v. *Marigold*, 9 How. 559, 566, 567.

3. As further demonstrating that the power to coin money authorizes the enactment of section 169 of the Criminal Code here involved, attention is directed to legislation passed pursuant to other constitutional powers not more embracing in their language. By paragraph 7 of section 8, Article I, Congress is merely given power to establish post offices and post roads, and yet under that power this court has approvingly noticed in *Lewis Publishing Company* v. *Morgan*, 229 U. S. 288, 301, the following concrete exertions:

> Under that six-word grant of power the great Postal System of this country has been built up, involving an annual revenue and expenditure of over five hundred millions of dollars, the maintenance of 60,000 post offices, with hundreds of thousands of employes, the carriage of more than fifteen billions of pieces of mail

> matter per year, weighing over two billions of pounds, the incorporation of railroads, the establishment of the Rural Free Delivery System, the money-order system, by which more than a half a billion of dollars a year is transmitted from person to person, the postal savings bank, the parcel post, an aeroplane mail service * * *.

Not only so, but there must not be overlooked the numerous so-called postal crimes created by sections 179–231, inclusive, of the Criminal Code of the United States. Those crimes are not more closely connected with the effective exercise of the power to establish post offices and post roads than the crime involved in the case at bar is connected with the power to coin money.

Other instances may be found approved in *Legal Tender cases*, 12 Wall. 457 et seq.

II.

Prohibition of mere possession not a new principle in the exercise of legislative power.

Repeated instances might be cited where both Federal and State legislatures, in the effective exercise of their constitutional powers, have deemed it necessary to prohibit, under penalty, the mere possession of certain specified articles. The instance upheld in *Crane* v. *Campbell*, 245 U. S. 304, is particularly pertinent. This court said:

> And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to

say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose.

We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge.

As the power to coin money is vested solely in Congress there is no escape from the conclusion that no citizen possesses the right, as against the prohibition of Congress, to have and to hold dies used in the coining of money, or replicas of them. The coinage power can not be effectively protected and preserved, if such dies or replicas may be indiscriminately possessed by unauthorized persons, such as appellant.

III.

It is respectively submitted that no adequate ground is shown for upsetting the judgment of conviction. The appeal should be dismissed on the ground that the constitutional question attempted to be raised is frivolous, or the judgment below affirmed.

ROBERT P. STEWART,
Assistant Attorney General.
HARRY S. RIDGELY,
Attorney.

JANUARY, 1921.

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SUPREME COURT OF THE UNITED STATES.

No. 614.—October Term, 1920.

Charles L. Baender, Appellant, vs. Frank Barnett, Sheriff, Etc. } Appeal from the District Court of the United States for the Northern District of California.

[February 28, 1921.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This is an appeal from an order denying a petition for a writ of *habeas corpus*. The petitioner was indicted under § 169 of the Criminal Code, which declares that "whoever, without lawful authority, shall have in his possession" any die in the likeness or similitude of a die designated for making genuine coin of the United States shall be punished, etc. The indictment charged that he "wilfully, knowingly" and without lawful authority had in his possession certain dies of that description. He entered a plea of guilty and was sentenced to pay a fine and suffer a year's imprisonment. He made an explanatory statement to the effect that the dies were in some *junk* he had purchased and that he did not know at the time of their presence nor of their coming into his possession; but so far as appears, the statement was made without his being under oath and with the purpose only of inviting a lenient sentence.

Originally the statute contained the qualifying words "with intent to fraudulently or unlawfully use the same," c. 127, § 1, 26 Stat. 742, but they were eliminated when it was incorporated into the Criminal Code, c. 321, § 169, 35 Stat. 1088, 1120.

The petitioner makes two contentions. One is that the statute is repugnant to the due process of law clause of the Fifth Amendment in that it makes criminal a having in possession which is neither willing nor conscious. The District Court in denying the petition held otherwise, saying that the statute rightly construed

means "a willing and conscious possession"; and the court added: "Such is the possession intended by the indictment, and such is the possession, the petitioner having pleaded guilty to the indictment, that he must be held to have had. Otherwise he was not guilty. He might have pleaded not guilty, and upon trial shown that he did not know the dies were in his possession."

We think the court was right. The statute is not intended to include and make criminal a possession which is not conscious and willing. While its words are general, they are to be taken in a reasonable sense and not in one which works manifest injustice or infringes constitutional safeguards. In so holding we but give effect to a cardinal rule of construction recognized in repeated decisions of this and other courts. A citation of three will illustrate our view. In *Margate Pier Co.* v. *Hannam*, 3 B. & Ald. 266, 270, Abbott, C. J., quoting from Lord Coke, said: "Acts of parliament are to be so construed, as no man that is innocent, or free from injury or wrong, be by a literal construction punished or endamaged." In *United States* v. *Kirby*, 7 Wall. 482, 486, this court said: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bologian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.'" And in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 301, we said: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."

The other contention is that the clause in the Constitution empowering Congress "to provide for the punishment of counter-

feiting the securities and current coin of the United States," Art. 1, § 8, cl. 6, is a limitation as well as a grant of power, that the act which the statute denounces is not counterfeiting, and therefore that Congress cannot provide for its punishment. The contention must be rejected. It rests on a misconception not only of that clause, but also of the clause investing Congress with power "to coin money" and "regulate the value thereof," Art. 1, § 8, cl. 5. Both have been considered by this court, and the purport of the decisions is (1) that Congress not only may coin money in the literal sense, but also may adopt appropriate measures, including the imposition of criminal penalties, to maintain the coin in its purity and to safeguard the public against spurious, simulated and debased coin; and (2) that the power of Congress in that regard is in no wise limited by the clause relating to the punishment of counterfeiting. *United States* v. *Marigold*, 9 How. 560, 567-568; *Legal Tender Cases*, 12 Wall. 457, 535-536, 544-545. It hardly needs statement that in the exertion of this power the conscious and willing possession, without lawful authority, of a die in the likeness or similitude of one used or designated for making genuine coin of the United States may be made a criminal offense. If this be not a necessary it is at least an appropriate step in effectively suppressing and preventing the making and use of illegitimate coin.

Final order affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.